



Office of the

# Utah County Attorney

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September 3, 2008

Chief Chad Smith  
Lehi City Police Department  
580 West State Street  
Lehi, UT 84043

Re: June 23, 2008 Officer Involved Shooting Incident

Dear Chief Smith:

As you know, pursuant to Utah Code Section 26-4-6, I am charged and authorized to investigate Utah County deaths that occur, among other reasons, as a result of violence or gunshot, or while the decedent was in police custody (Section 26-4-7). Further, I am to “determine if the decedent died by unlawful means and . . . if criminal prosecution shall be instituted” (Section 26-4-21).

The Utah County Law Enforcement Officer Involved Incident Protocol Task Force has concluded its investigation into the June 23, 2008, officer involved shooting incident in Lehi. After reviewing the results of that investigation and the pertinent statutes, I conclude that Lehi City Police Officers (Captain) Harold Terry, Greg Neer and Scott McDonald were legally justified in their use of deadly force against the decedent, Ms. Kelly Wark. In other words, I find that Ms. Wark died through lawful means and I determine that no criminal prosecution will be instituted against Officers Terry, Neer or McDonald.

The following is a brief factual summary of what I believe occurred and a short analysis of how I arrived at my legal conclusions:

### **FACTS**

On June 23, 2008, at approximately 8:46 a.m., a clerk at the Walkers/Wendy's gas station at 850 East Main, Lehi, called 911 and reported that a female customer appeared impaired. The clerk explained that the female, later identified as Ms. Kelly Wark, was "kind of lethargic," "weaving a little bit," "just really off balance" and "extremely impaired." The clerk also reported that she saw Ms. Wark pump less gas than she had paid for, sit in her car for approximately five minutes and then drive away from the gas station very slowly. The clerk described Ms. Wark's car to the dispatcher and indicated her direction of travel.

The dispatcher assigned the call to Officer McDonald at 8:46 a.m. However, Captain Terry was the first to locate Ms. Wark's car, which was at the intersection of 850 East Main Street. At approximately 8:52 a.m. Captain Terry stopped Ms. Wark in her car at 1100 East Main Street.<sup>1</sup> When Captain Terry first approached Ms. Wark's car, she had her window down and she was looking back at him as he walked up. By the time Captain Terry arrived at the driver's door she had rolled the window up. He walked to the driver's door, made contact with Ms. Wark through the window and asked her a few questions to determine if she was okay. Captain Terry informed her that he observed her stationary at a green light for an extended period of time. He requested that she roll down her window because he could not hear her responses to his question—and Ms. Wark complied. Captain Terry obtained Ms. Wark's driver's license and

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<sup>1</sup> By turning on his emergency lights, Captain Terry also automatically activated his dash-cam, which audio and videotaped the traffic stop.

registration which identified her as a resident of Washington State. He asked where she was currently living and general questions about her condition. During this initial conversation Officer McDonald arrived and stood next to Captain Terry at the driver's side window. At about this point Captain Terry asked Ms. Wark if she was experiencing a medical problem, again asked her why she waited so long to begin driving after the traffic light had turned green and explained that the employees of Walker's said she was "having trouble." Ms. Wark responded by reaching out of the car window and trying to grab her license and registration out of Captain Terry's hand. He told Ms. Wark, "Don't do that." She asked if he was going to give the papers back to her and he said, "Yes, in a minute."

Captain Terry then asked Ms. Wark to turn off her vehicle and take the keys out of the ignition--which she did. Ms. Wark became somewhat agitated at this point. She again tried to grab the papers from Captain Terry's hand. As she did, Officer McDonald took the car keys out of her hand. Captain Terry then leaned into the driver's window and Ms. Wark became extremely agitated, screaming repeatedly, "Don't touch me!" Captain Terry withdrew from the car window and Ms. Wark rolled up the window and locked the doors, still shouting, "Don't touch me!" and, apparently, "They are killing me!"

By now Lehi City Police Officer (Sergeant) Brian Larsen had arrived and stood at the passenger side of Ms. Wark's car and Officer Neer had arrived and stood to the rear of Ms. Wark's car (out of camera range).<sup>2</sup> Sgt. Larsen tried unsuccessfully to open the front passenger

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<sup>2</sup> He arrived only to obtain copies of witness statement forms for the witnesses at the Walker's gas station (he had run out of copies and intended to obtain copies from the other officers).

door. Captain Terry tried to calm Ms. Wark by repeatedly telling her to "relax." Captain Terry radioed for medical assistance at 8:55 a.m.

At this point, Ms. Wark removed her seat belt, retrieved a bag from the passenger seat area and reached inside. The officers, concerned about Ms. Wark's actions, responded. Captain Terry tried to open the driver's door but it was locked. Officer McDonald (who had the keys) unlocked the driver's door, Captain Terry opened it and commanded Ms. Wark to get out of the car. The officers then realized that Ms. Wark had a gun and Officer McDonald shouted, "It's a gun!" Captain Terry reached into the car with his left hand to control Ms. Wark and the gun, pinned Ms. Wark's gun to her right hip area, and drew his own weapon with his right hand. While Captain Terry was attempting to control the gun he told her repeatedly, "Put the gun down!" However, Ms. Wark fired the gun and the bullet struck the driver's side door frame and fragmented. Two of the fragments penetrated the left side of Captain Terry's head. Captain Terry also fired his weapon during this struggle but investigators were unable to determine what happened to his bullet.

When the fragments from Ms. Wark's bullet hit Captain Terry, he fell against the car and slid across the driver's side rear passenger door and fell to the ground. As Captain Terry fell, Ms. Wark came out of her car (from the driver's seat) aggressively and with her gun in her right hand. As she came out of the car she stepped past Captain Terry, quickly aimed her gun in the direction of Sgt. Larsen, Officer McDonald and Officer Neer (who were all at the rear of her car), and fired one shot at them. Her shot missed the officers. Officers McDonald and Neer returned fire. Officer McDonald fired two shots from his position at Ms. Wark's car's passenger side rear corner. Officer Neer fired three shots over the roof of the car as he moved east on the sidewalk

toward the front of the car on the passenger side. It appears that Officer McDonald's first shot grazed Ms. Wark's right arm and his second shot hit her in the left forearm just below the elbow, passing through her arm and striking her in the upper left chest. Officer Neer's first shot apparently missed Ms. Wark. His second shot struck Ms. Wark in the left ear and entered her brain stem. His third shot struck Ms. Wark in the left side of her jaw, exiting out the right side of her neck.

Ms. Wark quickly fell to the ground. Officer Neer came around the front of the car and covered Ms. Wark as Sgt. Larsen went to attend to Captain Terry. Officer McDonald provided cover from the passenger side of the car. Officer Neer checked Ms. Wark and saw the butt of her gun between her legs. He removed the gun and visually determined that Ms. Wark was no longer an active threat. Officer McDonald checked Ms. Wark's carotid artery and could feel no pulse. Emergency medical services personnel arrived, attended to Captain Terry, verified that Ms. Wark was deceased and, shortly thereafter, transported Captain Terry to the hospital.

## **LAW**

Utah Code Section 76-2-404 states:

(1) A peace officer, or any person acting by his command in his aid and assistance, is justified in using deadly force when: . . . (c) the officer reasonably believes that the use of deadly force is necessary to prevent death or serious bodily injury to the officer or another person.

Section 76-2-404(2) also states that, “[i]f feasible, a verbal warning should be given by the officer prior to any use of deadly force under Subsection (1)(b) or (1)(c).”

Similarly, Utah Code Section 76-2-402(1) states:

A person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that force is necessary to defend himself or a third

person against such other's imminent use of unlawful force. However, that person is justified in using force intended or likely to cause death or serious bodily injury only if he or she reasonably believes that force is necessary to prevent death or serious bodily injury to himself or a third person as a result of the other's imminent use of unlawful force, or to prevent the commission of a forcible felony.

## ANALYSIS

The police officers were justified in using deadly force against Ms. Wark if they reasonably believed “that the use of deadly force [was] necessary to prevent death or serious bodily injury to the officer or another person,” or they reasonably believed that “force [was] necessary to defend [themselves] or a third person against such other’s imminent use of unlawful force.” In this instance the facts are fairly straightforward: Captain Terry had conducted a lawful traffic stop and seizure of Ms. Wark and her car. During that traffic stop, with no lawful justification and contrary to the lawful, verbal orders of the officers, Ms. Wark removed a loaded handgun from her bag, fired it in the direction of Captain Terry and struck him. Ms. Wark then aggressively stepped out of her car, quickly aimed and fired her handgun at Sgt. Larson, Officer McDonald and Officer Neer. Accordingly, Officers McDonald and Neer reasonably believed that deadly force was necessary to defend themselves, Sgt. Larson and the injured Captain Terry from Ms. Wark’s actual and ongoing use of unlawful deadly force.

Although not pertinent to an analysis of the lawfulness of the police officers’ use of force, Ms. Wark’s mental state is an important aspect to this incident because her mental illness clearly influenced her actions.<sup>3</sup> After reviewing the records and interviews available to me, I cannot find

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<sup>3</sup> Because in this incident the Lehi officers’ use of force must be based primarily on their observations, the Protocol Team has centered its investigation on *what* occurred rather than on *why* it occurred. In other words, the Protocol Team has, rightfully, not expended its resources thoroughly investigating Ms. Wark’s mental illness.

that she had a recent mental health diagnosis. However, the records and interviews do support my conclusion that for a number of years Ms. Wark has had significant episodes of delusions and episodes of depression. Further, it is apparent that during the days and hours leading up to this incident Ms. Wark was enduring a significant episode of mental illness which induced paranoia, sleeplessness for many days and physical signs of impairment similar to those of one under the influence of drugs or alcohol. As a result, during the traffic stop Ms. Wark reacted to Captain Terry in a manner markedly different from the “norm” (recognizing that the range of normal encompasses a great deal of unusual behavior). In fact, immediately prior to Ms. Wark retrieving the gun, it appears from the Captain Terry’s dash camera video that she had completely lost control of her “normal” mental faculties and her subsequent judgment and actions were those of someone severely mentally ill.

### **CONCLUSION**

For the reason I stated above, I conclude that Lehi City Police Officers (Captain) Harold Terry, Greg Neer and Scott McDonald were legally justified under Utah Code Sections 76-2-402 and -404 in their use of deadly force against the decedent, Ms. Kelly Wark. I find, pursuant to Section 26-2-21, that Ms. Wark died through lawful means and I determine that no criminal prosecution should be instituted against Officers Terry, Neer or McDonald.

Sincerely,

Jeffrey R. Buhman  
Utah County Attorney

cc: Captain Harold Terry  
Officer Greg Neer  
Officer Scott McDonald